

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GOODLOW,

Defendant and Appellant.

A121769

(Solano County  
Super. Ct. No. VCR191496)

A jury convicted defendant Robert Goodlow of making criminal threats and stalking. Defendant contends his convictions must be reversed because (1) the trial court improperly denied his motion to represent himself after trial commenced, (2) the prosecutor denied him his right to confront the complaining witness by remaining intentionally ignorant of her allegations of past domestic abuse in order to preclude defendant from discovering them before trial, and (3) there was no substantial evidence defendant criminally threatened the complaining witness. Finding no merit in defendant's arguments, we affirm the judgment.

**I. BACKGROUND**

Defendant was charged by information with making criminal threats (Pen. Code,<sup>1</sup> § 422; count 1), infliction of corporal injury on a cohabitant (§ 273.5, subd. (a); count 2), assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd (a)(1); count 3), and stalking (§ 646.9, subd. (a); count 4).

---

<sup>1</sup> All further statutory references are to the Penal Code.

Defendant pleaded not guilty to all counts. A jury trial commenced on March 4, 2008. The court granted a mistrial that same day due to a witness disclosing excluded information before the jury. A second jury trial began on March 18, 2008. A second mistrial was granted, based on juror misconduct. Defendant's trial recommenced for a third time on April 15, 2008.

#### **A. *Prosecution Case***

Merilyn McClure testified that she and defendant had been a couple for 27 years. They were married on March 19, 2004, and separated in November 2004. They had one son together, M., who was 13 years old and lived with McClure.

On April 9, 2007, McClure was working as an admitting representative at Kaiser Hospital in Vallejo. Around noon, McClure was sitting in the third cubicle in the office. She normally sat in the second cubicle. She heard the office door open and close. McClure's fellow employee, Sherrell Jones, handed her a handwritten note Jones had retrieved from the desk in the second cubicle. The note read: "Merilyn McClure [¶] the crimes that you have committed on [M.]a carrys [sic] a death sentence. So thats [sic] what you have coming is death. You are not going to get away." McClure recognized the handwriting on the note as defendant's. She had worked at the Kaiser facility in Vallejo since March 2003, and defendant knew where she worked.

McClure immediately went to her manager's office, told her about the note, and called 911. She was scared and angry, and was shaking and crying. She believed her husband was capable of trying to kill her because he had a lengthy history of hitting and injuring her. McClure testified defendant had hit her 50 or 60 times over the course of their relationship. The police had been called 10 to 15 times. He had slapped and punched her in the face, hit her on the shoulder with a hammer and on the head with a piece of wood, and beaten her with a dog chain. Defendant had broken McClure's nose and right wrist, broken bones in her hand, and given her a black eye.

McClure did not see defendant at her workplace on April 9, 2007, but she identified him from a surveillance videotape recording made on that date around 12:15 p.m., near the elevators on the second floor of the building she worked in. While

watching the video, McClure testified, “That is [defendant] right there. There goes [defendant] right there coming towards the camera right there. That is [defendant] right there going out the door heading towards the door, and there is [defendant] coming right behind this person that is pushing this dolly.”

McClure testified about a second incident on May 24, 2007, in which defendant pulled up to her on the street when she had left Kaiser on her lunch break. She ran from him but he caught her and hit her in the face above the eye. She fell to the ground and he landed on top of her. Defendant threw a baseball-sized piece of concrete that flew past her head. Bystanders came to her assistance, and a female said, “The police have been called.”<sup>2</sup> Defendant said, “I don’t care. I’m going to get her.” He then got in his truck and drove away. One of the bystanders handed McClure a piece of paper with what he told her were his name and telephone number written on it. She turned the paper over to police. At trial, McClure identified photographs taken of her after the assault showing dirt and leaves on her clothing, disheveled hair, and a small cut above her left eye.

Laurie Munoz, admitting manager at Kaiser Vallejo, testified she received defendant’s note from one of her employees, and called police to report the matter. She acknowledged testifying previously that she was “the one who broke the news to [McClure],” and McClure got upset and started crying. McClure was “hysterical” and “screaming almost.” Munoz also testified regarding McClure’s appearance and demeanor when she returned from lunch on May 24, 2007. She had a cut on her face, her clothing was dirty and covered with weeds, and she was crying and upset. McClure told Munoz she got hit in the face with a rock.

On June 19, 2007, Tina Rigney was working as an “admitting rep” at Kaiser Vallejo when she received a telephone call from a male who asked for “Merilin.” Rigney received a second call later that day from someone who identified himself as “Ray.” The second caller said, “Tell Merilin that she is going to be beaten in the head with a lead

---

<sup>2</sup> McClure did not see anyone call 911.

pipe and both of . . . her hands are going to be cut off at the wrist for what she did to her son.”

Vallejo Police Officer Robert Greenberg testified McClure handed him a piece of paper with a name and telephone number on it on May 24, 2007. He called the number two or three times, but was unable to locate anyone who witnessed the incident McClure described.

### ***B. Defense Case***

Ron Brazell testified he and defendant had known each other for almost 40 years, both of them having worked together as carpenters with a San Francisco union local. Brazell owned a lot where defendant kept his pit bull dog. He stated that in January 2005, McClure appeared on the lot and demanded Brazell’s caretaker allow her to take the dog. When McClure spoke to Brazell about it over the telephone, she screamed and swore at him, and threatened to “fuck [him] up, fuck up [his] property, fuck up [his] money.” Brazell also overheard her threatening the caretaker.

Martha Martinez testified that the telephone number written on the piece of paper McClure turned over to police on May 24, 2007 belonged to her. She had lived at the same address and had that telephone number continuously for the last 12 years. She had no knowledge of the person whose name was written on the paper.

William Powell was the policy and operations manager for Vallejo’s 911 police dispatch system. He produced a log of 911 calls on May 24, 2007, and was unable to find any 911 call relating to the May 24 incident described by McClure other than the call placed by McClure’s Kaiser supervisor after McClure returned to her workplace.

Defendant testified he and McClure began having problems in 2004 or 2005, over McClure’s physical abuse of their son. Defendant threatened to take action to take their son away from her. In response, McClure threatened defendant with a handgun. Defendant testified that in November or December 2004, he drove his son to a police station to report McClure’s abuse of the son. McClure called the police that day and claimed defendant had kidnapped their son and stolen her car.

Defendant denied attacking McClure in May 2007, denied leaving any threatening note for her on April 9, 2007, and denied calling Kaiser to make an oral threat in June 2007. He also denied being the person shown in the surveillance tape, as McClure had claimed.

### ***C. Prosecution Rebuttal***

Called as a prosecution rebuttal witness, defendant's son remembered his father taking him to the police station but did not remember what it was about. He did not see his mother threaten his father with a handgun. When he got into trouble with his mother, she would sometimes spank him, but she never struck him in the face or hit him with any object.

### ***D. Verdict, Sentence, and Appeal***

The jury convicted defendant of making criminal threats (count 1) and stalking (count 4) in connection with the incidents on April 9 and June 19, 2007. It acquitted him of infliction of corporal injury on a cohabitant (count 2) and assault with a deadly weapon by means of force likely to cause great bodily injury (count 3) in connection with the incident alleged on May 24, 2007.

The court sentenced defendant to the two-year midterm on count 1, and a concurrent two-year term on count 4. This timely appeal followed.

## **II. DISCUSSION**

Defendant contends his convictions must be reversed because (1) the trial court violated his Sixth Amendment rights by denying his motion to represent himself following the first day of trial, (2) the prosecution denied him his Sixth and Fourteenth Amendment rights to fully cross-examine and rebut McClure's allegations at trial of past domestic abuse by remaining intentionally ignorant of those allegations in order to preclude defendant from discovering them before trial, and (3) there was no substantial evidence to support defendant's convictions on counts 1 and 4.

## **A. Motion to Represent Himself**

### **1. Facts**

On October 5, 2007, the trial court granted defendant's motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to replace his appointed attorney. On November 26, 2007, the court granted appointed counsel's motion to be relieved as defendant's counsel. As noted, two jury trials ended in mistrials in March 2008. The third trial commenced on April 15, 2008. At the end of the first day of trial, after the completion of McClure's testimony on direct and cross-examination, defendant made a new *Marsden* motion. The court held a hearing on that date, and denied the motion. Defendant then moved to represent himself.

The next morning, defendant renewed his *Marsden* motion, and the court denied it. The court proceeded to hear defendant's motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). During argument on the motion, defense counsel commented that he did not think defendant had "any plans to disrupt the proceedings." The court responded: "I'm not concerned about disruption."<sup>3</sup> Counsel also pointed out there were "only a couple hours left of this trial," and he did not think defendant planned to ask for a delay. The court responded: "That is irrelevant, what his plans are. The issue is whether or not, at this stage of the proceeding, he should be allowed to act on his own behalf." The prosecution stated it was concerned the trial would be delayed by "a lot of unnecessary back and forth objections of [defendant] attempting to . . . rehash[] rulings that he considers objectionable that the Court made previously."

The court denied the motion and explained its reasons as follows: "The reasons for the denial are that there's nothing the matter with the quality of counsel's defense. As a matter of fact, I think counsel has gone overboard in trying to present [defendant's] point of view. Whether or not his point of view is relevant in this case is the question.

---

<sup>3</sup> It is not clear from the cold record whether the court believed there would be no disruption or believed it could handle any disruption that might occur.

The reasons why [defendant], in my view, is making this request is not because he is unhappy with his attorney. He is unhappy with the Court and the Court's ruling. But [defense counsel] has no control over that, nor does [the prosecutor], nor does the defendant. The Court rules the way the Court feels the law requires it to rule, and that is why the rulings are made. But the overwhelming reason . . . that I'm denying this motion is the fact that this would unduly prejudice, in my view, this defendant in the eyes of the jury to have counsel leave the scene after hearing the critical witness in this case, or almost hear everything that that witness has to say. And all of a sudden without explanation [defendant] represents himself and counsel is out of the picture to me would be very highly prejudicial to the defense's case. And for all of those reasons, I am denying the motion."

## **2. Applicable Law**

A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so. (*Faretta, supra*, 422 U.S. 806.) However, the right to self-representation is not absolute and unconditional. Motions for self-representation made too close in time to or after commencement of the defendant's trial may be rejected in the trial court's discretion: "In order to invoke an unconditional right of self-representation, the defendant must assert the right 'within a reasonable time *prior to the commencement of trial.*' [Citations.] *A motion made after this period is addressed to the sound discretion of the trial court.* [Citations.]" (*People v. Burton* (1989) 48 Cal.3d 843, 852, italics added.)

As stated in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*): "For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors . . . ." (*Id.* at p. 128, fn. 5.) The trial court should consider " 'such factors as the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of

the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion.’ ” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1104–1105 (*Barnett*).)

A reviewing court must give “ ‘ “considerable weight” ’ ” to the trial court’s exercise of discretion. (*People v. Hall* (1978) 87 Cal.App.3d 125, 132.) We presume the court knows and correctly applies the law. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

### **3. Analysis**

Defendant focuses on the court’s comments indicating it did not deny his motion out of concern about disruption or delay of the trial. According to defendant, the court “explicitly rejected any concern or consideration with regard to delay or disruption of the proceedings,” and instead based its decision on a “paternal concern that self-representation was an unwise decision for the defendant.” Defendant points out that, under *Faretta*, the wisdom (or lack thereof) of a defendant representing himself at trial is not a basis for denying his request to do so. (*Faretta, supra*, 422 U.S. at p. 835.)

Relying chiefly on a footnote in *Windham*, defendant takes the position that, where there is no issue of delay or disruption of the trial, even a midtrial request for self-representation invokes a *constitutional* right under *Faretta* and is not merely a matter of trial court discretion. Our Supreme Court in *Windham* held that in order to invoke the constitutionally mandated unconditional right of self-representation, a defendant in a criminal trial must assert that right within a reasonable time *prior* to trial.<sup>4</sup> (*Windham, supra*, 19 Cal.3d at pp. 127–128.) In the footnote highlighted by defendant, the court provides some guidelines for applying the “reasonable time” requirement: “Our

---

<sup>4</sup> The court’s specific words were as follows: “We hold therefore that in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.” (*Windham, supra*, 19 Cal.3d at pp. 127–128, fn. omitted.)

imposition of a ‘reasonable time’ requirement . . . must not be used as a means of limiting a defendant’s *constitutional* right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.” (*Id.* at p. 128, fn. 5.) Defendant construes this to mean that the constitutional right of self-representation continues after trial and, even at that stage, may not be limited absent concern about delay or disruption of the trial.

In our view, defendant misreads *Faretta* and *Windham*. The footnote upon which defendant relies has no bearing on *Faretta* motions made *after* trial commences. Its evident purpose is to give trial courts guidance in determining when a pretrial *Faretta* motion is or is not brought a “reasonable time” *before* trial. Following the text quoted in the previous paragraph, the footnote goes on to give examples of when requests for self-representation made in very close proximity to the trial date might nonetheless be justified. (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) It contains no examples of requests made after the trial begins. Read as a whole, the footnote does not in any way suggest that the same type of analysis applies in that circumstance. In fact, defendant’s reading of the footnote is contradicted by the *Windham* court’s legal analysis, and by its disposition of defendant *Windham*’s appeal.

*Windham*’s holding is expressly predicated on an analysis of post-*Faretta* case law addressing the issue of when a defendant must be deemed to have lost his unconditional right of self-representation. (*Windham, supra*, 19 Cal.3d at pp. 126–127.) The *Windham* court expressly relies on the Second Circuit’s position in *Sapienza v. Vincent* (2d Cir. 1976) 534 F.2d 1007, 1010, that “*Faretta* does not involve motions made after the commencement of trial.” (*Windham*, at p. 127, fn. omitted.) The court further observes that the Second Circuit’s view of *Faretta* had been adopted in other jurisdictions and that no post-*Faretta* decision had held the constitutional right at issue in *Faretta* continued to apply “once [a defendant] proceeds to trial represented by counsel.” (*Windham*, at p. 127.) This reading of the constitutional right recognized in *Faretta*—that a *pretrial* motion is an essential predicate to its exercise—was the express legal basis for the

*Windham* court's holding that the constitutional right to self-representation ceases to exist whenever the defendant fails to invoke it a reasonable time before trial. (*Windham*, at pp. 127–128.)

Consistent with its legal analysis, *Windham*'s analysis of the facts before it also contradict defendant's position in this appeal. As in this case, the *Windham* defendant's request for self-representation came prior to the commencement of the last day of trial. (*Windham, supra*, 19 Cal.3d at p. 125.) The defendant faulted his trial attorney for having failed to elicit testimony supporting his theory of self-defense. (*Ibid.*) The prosecution did not oppose the motion and defense counsel expressed willingness to serve as advisory counsel if the motion was granted. (*Ibid.*) The opinion hints at no concern by the parties or the court that allowing defendant to represent himself would have delayed or disrupted the trial. In fact, the only trial task left for the defense when the request was made was to deliver its closing argument to the jury. (*Id.* at p. 130.) The trial court denied the defendant's request "principally on the ground that it came at too late a stage of the proceedings." (*Id.* at p. 125.) On these facts, which are not materially distinguishable from the record before this court, the Supreme Court in *Windham* rejected the defendant's argument that the trial court erred in denying his motion to represent himself, and *affirmed* his conviction. (*Id.* at p. 131.) Far from supporting defendant's position here, *Windham* completely refutes it from a factual as well as legal standpoint.

Defendant cites no case recognizing a *constitutional* right of self-representation existing *after* trial had already commenced. (See, e.g., *People v. Tyner* (1977) 76 Cal.App.3d 352 [day-of-trial motion made prior to impaneling of the jury]; *People v. Herrera* (1980) 104 Cal.App.3d 167 [same].) Although defendant finds it ambiguous, *People v. Bloom* (1989) 48 Cal.3d 1194 restated and reaffirmed *Windham*'s holding as follows: "A request for self-representation asserted for the first time after trial has commenced . . . is 'based on nonconstitutional grounds' [citation] and is addressed to the sound discretion of the trial court [citation]." (*People v. Bloom*, at p. 1220; see also *Barnett, supra*, 17 Cal.4th at pp. 1104–1105.)

We therefore reject defendant's argument that the trial court violated his constitutional right to represent himself. As a fallback position, defendant argues that since there was assertedly no question of delay or disruption of the trial in this case, the denial of the request was necessarily an abuse of discretion. For this, defendant cites *People v. Nicholson* (1994) 24 Cal.App.4th 584 (*Nicholson*). We note first that the motions for self-representation in issue in *Nicholson* took place nine calendar days before jury selection was due to begin. (*Id.* at p. 587.) Although the appellate court chose to treat the defendants' motions for self-representation as nonconstitutional, its discussion of the abuse of discretion standard must be considered dictum because the motions were in fact brought a reasonable time before the trial actually commenced. *Nicholson* states that where self-representation is requested for a legitimate reason, and there is no request for a continuance or reason to believe there would be any delay or disruption, it is an abuse of discretion for the court to deny a *Faretta* motion. (*Nicholson*, at p. 593.) To the extent that *Nicholson* may be read broadly to suggest that a single consideration—the absence of delay or disruption—is controlling when a motion for self-representation is made in midtrial, we do not agree with it and believe it is inconsistent with the multi-factor analysis as prescribed and applied in *Windham*, *Barnett*, and many other cases. If delay and disruption were the controlling factors as a matter of law, there would be no need for the trial courts to consider any other issues in the exercise of their discretion. In any event, *Nicholson* is distinguishable. The trial court in this case did not accept the legitimacy of defendant's reasons for wanting to represent himself. It believed and stated that defendant wanted to represent himself for an illegitimate reason—his unhappiness with the court's rulings.

In our view, there were ample grounds to support the trial court's denial of defendant's motion: the high quality of defendant's representation, defendant's prior *Marsden* motions, the absence of any valid reason for the request, the late stage of the proceedings, and the potentially prejudicial inference jurors might draw from the fact that defense counsel would be removed in the immediate aftermath of the complaining witness's damaging testimony. Even assuming the court was not concerned with

potential delay or disruption of the trial, it acted within its discretion in denying the motion.

In any event, assuming for the sake of analysis the court erred in denying defendant's motion, the error was harmless. As the United States Supreme Court has stated, "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8, quoted in *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) It is not reasonably probable this case would have been an exception. Defendant testified on his own behalf and was able to tell his side of the story directly to the jury. The trial court itself found defense counsel to be highly capable and zealous in his advocacy on defendant's behalf. In fact, the jury acquitted defendant of two serious felony charges despite strong evidence against him. We have no reason to believe defendant could have mounted a stronger defense by becoming his own attorney.

Further, the evidence of defendant's guilt for making criminal threats and stalking was compelling. As discussed *post*, there was little reason to doubt the note constituted a criminal threat. And, unlike the May 24 assault, defendant's involvement in the criminal threat of April 9 and the threatening telephone call of June 19 were strongly corroborated by either physical evidence or third party testimony. The April 9 note was in his handwriting and defendant was caught on the hospital surveillance video camera at the time it was left. A third party witness testified to the June 19 telephone calls. The content of the note and telephone call uniquely identified defendant as the perpetrator. No one else was as overwrought about McClure's supposed abuse of [M.] as defendant. Barring proof of some elaborate conspiracy by McClure to frame him—a theory for which no evidence existed—the evidence unmistakably inculpated defendant in these offenses.

Based on the quality of the representation he received, the opportunity he exercised to testify on his own behalf, the strength of the evidence against him, and the late stage of the proceedings, we do not find it reasonably probable defendant would have

obtained a better result had the trial court allowed him to represent himself. Any error in denying defendant's midtrial request for self-representation was therefore harmless.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.)

We also reject defendant's argument that error in denying a nonconstitutional request for self-representation automatically requires a reversal. As with any other error of state law, the applicable standard is harmless error under *People v. Watson*. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050–1051; *Nicholson, supra*, 24 Cal.App.4th at pp. 594–595.) Defendant cites no convincing authority or reason to reject *Rivers* and *Nicholson* on this point.

### **B. Prevention of Discovery**

Defendant contends the prosecution followed a deliberate strategy of failing to interview McClure about the details of her domestic abuse allegations against him until trial, in order to keep the defense in the dark and prevent it from effectively cross-examining McClure about her allegations.

#### **1. Facts**

In January 2008, the court granted defendant's request for funds to hire a private investigator to investigate incidents charged in a 2005 domestic violence prosecution of defendant (in which he was ultimately acquitted), as well as the incidents charged in this prosecution. In February 2008, the prosecution moved pursuant to Evidence Code sections 1101, subdivision (b), and 1109, to admit evidence of prior acts of violence committed by defendant against McClure. The motion referenced a 2002 misdemeanor conviction, a 2003 arrest, and the 2005 incident and charges leading to an acquittal. However, the prosecutor withdrew his motion at a pretrial hearing on March 4, 2008, explaining that the files containing information regarding these events had been purged, and he had no other evidence to present concerning them.

After the first mistrial, the prosecutor renewed his motion to admit evidence of prior acts of domestic violence by defendant. Defense counsel objected to McClure testifying about any incident not reported to the police and documented in a police report, commenting, "She can't just come up here and put 27 years' worth of history without

some notice to us about what we need to defend against.” According to the prosecutor, McClure could testify there had been many prior incidents but she could not provide dates or details of what conduct occurred because there had been too many over too long a period of time. The court ruled McClure was “entitled to testify as to her background with [defendant] and—as it goes to her state of mind and her fearfulness of what he might or might not do.” When the issue came up again during the trial, the court stated, “[McClure] can testify . . . concerning her past conduct with [defendant], regardless of whether or not it’s in a report; because if she can testify to it, he can deny it . . . . It just seems to me we cannot simply stop this relationship by presenting a false impression to the jury that there’s nothing that happened, unless it was written down in a report.”

In a later colloquy during McClure’s testimony, with the jury not present, the prosecutor acknowledged he had not previously elicited from McClure any of the specific information she was then in the process of testifying about, such as her testimony defendant had broken her wrist or hit her with a hammer or beaten her with a dog chain. He stated: “I don’t ask my victims for specific conducts or specific questions regarding incidents because it makes me become a potential witness.” Defense counsel informed the court that McClure had refused to talk to his investigator so he had no opportunity to learn about the specifics of her past domestic violence allegations. On cross-examination, McClure testified the prosecutor did not ask her many questions before trial because “[j]ust like he stated to the Court, anything he might ask me he had to report to you [defense counsel], so he did not ask me for any specific injuries.”

Later, the parties stipulated that if called as a witness, the prosecutor would testify as follows: “On or about March 11th, 2008, [I] asked Ms. McClure if there were other domestic violence incidents involving [defendant] other than the incidents testified to in this trial from 2002 and 2005. She told [me] there were so many that she could not recall any specific acts committed by [defendant] against her.”

## ***2. Applicable Law***

Section 1054.1 requires the prosecution to disclose the following information to the defense *if* it is in the prosecuting attorney’s possession or *if* the prosecuting attorney

knows it to be in the possession of the investigating agencies: “(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] . . .

[¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . .” The prosecutorial obligation to disclose relevant materials in its possession includes information “ ‘within the possession or control’ ” of the prosecution. (*In re Littlefield* (1993) 5 Cal.4th 122, 135 (*Littlefield*)). Information subject to disclosure includes information “ ‘readily available’ ” to the prosecution and not accessible to the defense. (*Ibid.*) *Littlefield* held the “names and reasonably accessible addresses of witnesses” must be disclosed under section 1054.1. (*Littlefield*, at p. 133.) The prosecution cannot avoid its obligation of disclosure by deliberately refraining from obtaining the address of a witness. (*Id.* at pp. 134–136.)

On the other hand, “[a]lthough the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant’s investigation for him. [Citation.] If the material evidence is in a defendant’s possession or is available to a defendant through the exercise of due diligence, then . . . the defendant has all that is necessary to ensure a fair trial . . . .” (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048–1049.)

### **3. Analysis**

We have found no case in which a prosecutor was held to be under a duty to elicit substantive information from a witness in order to be able to disclose that information to the defense. Here, the defense had sufficient information to locate McClure and interview her itself. McClure’s refusal to speak to the defense investigator is not attributable in any way to the prosecution. Moreover, the prosecutor stipulated in substance that he could not have asked McClure for the details of specific incidents even if he wanted to because she told him there were so many she could not recall any specific acts defendant committed against her. McClure’s trial testimony was consistent with the prosecutor’s stipulated testimony: she could remember injuries she suffered and a few objects defendant had used to hit her, but she could not remember the specific incidents

or when they occurred. Given McClure’s lack of specificity concerning the dates and circumstances of the events about which she testified, it is not at all clear what defense counsel could have done to prepare a more effective cross-examination. For example, without knowing the dates or circumstances of these events, defendant could not have gathered medical documentation or located witnesses to refute them. While defendant complains at length about the prosecutor’s alleged “gamesmanship,” he is notably silent about what his trial counsel might have done to discredit McClure if he had advance knowledge of her trial testimony, given its lack of detail.

For these reasons, defendant has failed to establish a violation of statute or of his rights under the Sixth or Fourteenth Amendments.

### **C. Substantial Evidence**

Defendant was convicted under section 422 of making a criminal threat. One of the elements of the offense is that the threat was “ ‘ ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.’ ” (In re George T. (2004) 33 Cal.4th 620, 630 (George T.), quoting *People v. Toledo* (2001) 26 Cal.4th 221, 227–228.) Defendant insists there is no substantial evidence in the record to support the jury’s implicit finding that the April 9 note constituted an unequivocal threat of death. According to defendant, both of his convictions must be reversed on this basis because the April 9 note is also not a “credible threat” or second act of “harassment” for purposes of section 646.9.<sup>5</sup> We are not persuaded.

In a prosecution under section 422, the “threat must be such that would cause a reasonable person to fear for the safety of himself or his family.” (*People v. Thornton* (1992) 3 Cal.App.4th 419, 424.) The statute does not require the violator actually intend

---

<sup>5</sup> Section 646.9 makes it a crime to “willfully and maliciously harass[] another person and . . . make[] a credible threat with the intent to place that person in reasonable fear for his or her safety . . . .” (§ 646.9, subd. (a).) Harassment for purposes of the statute requires two or more acts. (*Id.*, subds. (e), (f).)

to cause death or serious bodily injury to the victim. (*Ibid.*) The note in this case read as follows: “Merilyn McClure [¶] the crimes that you have committed on [M.] carrys [*sic*] a death sentence. So thats [*sic*] what you have coming is death. You are not going to get away.” Defendant asserts that although “[t]he writer of the note here certainly believes the complaining witness *should* get the death sentence, [he] at no time indicates that he *will* be the one to carry it out.”

Defendant compares the note’s wording to the wording of a poem found not to constitute a criminal threat in *George T.*: “I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!” (*George T.*, *supra*, 33 Cal.4th at p. 625.) According to the Supreme Court in *George T.*, the poem was not a criminal threat because the author was saying, at most, only that he “could” be the next kid to kill students at a school, meaning he had the capacity to do it, not that he *would* carry out such an act. (*Id.* at p. 636.) Viewing the poem’s wording in isolation, the court found it to be ambiguous rather than unequivocal. (*Id.* at p. 637.) The court also emphasized the communication was written in the form of a poem (*id.* at pp. 636–637), and noted poems are “inherently ambiguous” and often intended to be taken figuratively rather than literally. (*Id.* at p. 636.) Further, the poem contained no threat against any particular student. In addition, the court found there were no surrounding circumstances, such as a history of animosity or conflict between the defendant and the complaining students, or threatening gestures or mannerisms accompanying the poem, making the poem’s potential threat to bring guns to school and shoot students sufficiently unequivocal to convey an immediate prospect it would be carried out. (*Id.* at pp. 637–638.)

The facts before us are entirely distinguishable from those in *George T.* We are dealing with a note warning McClure a death sentence was to be carried out against her. Unlike a poem, this was no figurative expression of the author’s feelings, possibly spoken in a fictional voice. (See *George T.*, *supra*, 33 Cal.4th at p. 636.) The note was not directed to all students at a school, but solely to McClure. Its words conveyed not only

that she *deserved* a death sentence for her asserted “crimes,” but that the death sentence *would* be carried out. The writer’s certainty about the latter was unmistakably conveyed by the second sentence of the note—“thats what you have coming is death”— and reinforced by the third sentence—“you are not going to get away.” In all relevant respects, this is completely unlike the juvenile defendant’s ambiguous prose poem in *George T.*

The surrounding circumstances in this case, unlike in *George T.*, also fully reinforced the clear import of the note—that defendant intended to carry out a death sentence against McClure. Obviously, the state had imposed no death sentence on McClure and no such sentence was even remotely possible. A reasonable person could only conclude from reading the note that the writer was threatening her with death. Coming from defendant, this was not a threat McClure could take lightly. Defendant had beaten McClure in the past, inflicting serious injuries, and had clearly developed a deep-seated hatred of her that had become focused on McClure’s supposed abuse of their child. When McClure saw the note, she had good reason to believe defendant had shown up at her workplace moments earlier to carry out his threat, had only failed to do so because she had not been sitting at her usual desk, and might still be nearby waiting for his opportunity. There was no comparable evidence in *George T.* showing the defendant had a history of animosity toward and capacity to inflict serious injury on the complaining witnesses, or had taken threatening steps to back up his words. In short, we find there was substantial evidence in this case to support defendant’s convictions for making a criminal threat and stalking.<sup>6</sup>

---

<sup>6</sup> We do not reach defendant’s argument that his stalking conviction must fail if no substantial evidence supports his criminal threat conviction.

### **III. DISPOSITION**

The judgment is affirmed.

---

Margulies, Acting, P.J.

We concur:

---

Dondero, J.

---

Banke, J.